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No. 93-376

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In the Supreme Court of the United States

OCTOBER TERM, 1993

KEY TRONIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

STANTON ROAD ASSOCIATES, PETITIONER

v.

LOHREY ENTERPRISES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether the provision in Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607(a), that allows a private party to recover the "costs of response" to pollution at designated sites, implicitly authorizes the recovery of attorney fees.

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OPINIONS BELOW

The opinion of the court of appeals in the *Key Tronic* case (Pet. App. A1-A5) is reported at 984 F.2d 1025. The opinion of the court of appeals in the *Stanton Road* case (Pet. App. C1-C20) is reported at 984 F.2d 1015. The opinion of the district court in the *Key Tronic* case (Pet. App. B1-B15) is reported at 766 F. Supp. 865. The opinion

of the district court in the *Stanton Road* case (Pet. App. D1-D15) is unreported.

JURISDICTION

The judgments of the court of appeals in both cases were entered on January 28, 1993. Petitions for rehearing were denied in both cases on June 7, 1993. Pet. App. E1, F1. The petition for a writ of certiorari was filed on September 7, 1993 (a Tuesday after a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petition challenges two separate judgments of the Ninth Circuit, rendered in two separate cases consolidated for argument before the court of appeals. The United States is a party only in the *Key Tronic* case.

1. The *Stanton Road* case arises out of the effects of a dry cleaning plant owned and operated by the private respondents near property owned by petitioner Stanton Road Associates.[1] The private respondents allowed hazardous chemicals from the dry cleaning plant to contaminate Stanton Road's land. Pet. App. C2, D2-D6.

a. Stanton Road filed suit in the United States District Court for the Northern District of California, claiming that it was entitled under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607(a), to recover from the private respondents the costs of remedying the contamination, including attorney fees. After a bench trial, the district court ruled in favor of Stanton Road. Pet. App. D1-D15. The district court ordered the private respondents to pay Stanton Road $1,100,000 (to be deposited in an escrow account to cover the costs of remedying the contamination), together with $126,197.78 for attorney fees. *Id.* at D11.

[1] This brief refers to the respondents in the *Stanton Road* case as the private respondents.

b. A divided panel of the court of appeals reversed. Pet. App. C1-C20. Of relevance to the petition, the court concluded that the district court erred in awarding attorney fees. *Id.* at C4-C11. The court reviewed the applicable statutory language, which authorizes recovery of the "necessary costs of response" and defines "response" as "removal, remedy, and remedial action * * * includ[ing] enforcement activities related thereto." CERCLA §§ 107(a), 101(25), 42 U.S.C. 9607(a), 9601(25). Although the court of appeals acknowledged (Pet. App. C5) that the Eighth Circuit had allowed recovery of attorney fees as part of the "necessary costs of response" in *General Electric Company* v. *Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1421-1422 (1990), cert. denied, 499 U.S. 937 (1991), the court of appeals reached a different conclusion. The court noted the "American Rule" described by this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975), under which "a prevailing party cannot recover attorneys' fees in the absence of congressional authority." Pet. App. C6. The court also considered (*id.* at C7) this Court's opinion in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), which stated that attorney fees are not recoverable "absent explicit congressional authorization," *id.* at 185. Relying on those cases, the court concluded that the reference to "enforcement activities" in Section 101(25) of CERCLA was not sufficiently explicit to justify an award of attorney fees. Pet. App. C7.[2]

[2] Judge Canby dissented (Pet. App. C15-C20). On the attorney fee question, he argued that the panel's conclusion rendered the reference to "enforcement activities" in 42 U.S.C. 9601(25) superfluous, because attorney fees would be the main component of the costs of enforcement activities. Pet. App. C15-C19.

2. The *Key Tronic* case involves the Colbert Disposal Site in Spokane County, Washington. During the 1970's, the operator of that site disposed of hazardous waste it accepted from several parties, including petitioner Key Tronic as well as the United States Air Force. When it was discovered in 1980 that water wells near the site were contaminated, the Washington Department of Ecology (WDOE) and the federal Environmental Protection Agency (EPA) responded. Eventually, the government agencies entered into separate settlements with both Key Tronic and the Air Force. First, a settlement agreement with the Air Force required it to pay $1.45 million; in accordance with a provision for de minimis settlements in Section 122(g)(5) of CERCLA, 42 U.S.C. 9622(g)(5), the agreement provided that the Air Force would "not be liable for claims for contribution regarding matters addressed in the settlement." Second, a consent decree with Key Tronic required it to pay $4.2 million in cleanup costs. Pet. App. A2 & n.1, B2.

a. Petitioner Key Tronic Corporation filed suit against a variety of parties (including the United States) in the United States District Court for the Eastern District of Washington, seeking recovery under CERCLA for the costs it incurred pursuant to its settlement, as well as attorney fees and additional response costs that it claimed it had incurred independently. The court resolved a variety of dispositive motions in an opinion issued in 1991. Pet. App. B1-B15. Among other things, the district court held that the United States was liable for attorney fees as part of the necessary costs of response. *Id.* at B6-B13.

b. A divided panel of the court of appeals reversed. Pet. App. A1-A5. The relevant portion of the opinion relied entirely on the opinion in the *Stanton Road* case, summarized above. Pet. App. A4. Judge Canby dissented,

relying on his dissent in the *Stanton Road* case. Pet. App. A5; see note 2, *supra*.

3. The court of appeals denied petitions for rehearing and suggestions for rehearing en banc in both cases, with no recorded dissent other than that of Judge Canby. Pet. App. E1, F1.

ARGUMENT

Although we believe the decision of the court of appeals is correct, the question presented by the petition is an important one on which the courts of appeals are divided. Accordingly, the petition should be granted.

1. As the court of appeals recognized, the question before the Court must be resolved under the principle, consistently applied by this Court, that attorney fees are not recoverable in federal courts except as prescribed in an explicit authorization by Congress. See, *e.g.*, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975); *Runyon* v. *McCrary*, 427 U.S. 160, 185 (1976). The provisions of CERCLA relevant to these actions do not refer to attorney fees. Accordingly, petitioners were not entitled to recover attorney fees as part of the necessary costs of response to the covered environmental contamination.

The significance of the absence of any reference to attorney fees in the provisions applicable to this action is underscored by the presence of express references to attorney fees in other provisions of CERCLA. See, *e.g.*, 42 U.S.C. 9659(f) (prevailing parties in citizens suits may recover "costs of litigation (including reasonable attorney and expert witness fees)"); 42 U.S.C. 9610(c) (employee-whistleblowers may recover "all costs and expenses (including the attorney's fees)").[3] Accordingly, as

[3] See also 42 U.S.C. 9604(b) (authorizing federal government to "undertake such * * * legal * * * studies or investigations as

the Ninth Circuit explained, CERCLA is a statute where "Congress has repeatedly demonstrated that it knows how to express its intention to create an exception to the American Rule." Pet. App. C7. Thus, it also is a statute where it would be particularly inappropriate to interpret vague and indefinite language as implicitly authorizing the recovery of attorney fees.[4] Hence, the Ninth Circuit's conclusion that CERCLA does not authorize attorney fees in this context is correct.[5]

2. For several reasons, the question presented by the petition warrants review by the Court. First, the several courts of appeals that have considered the question have reached conflicting results. Like the Ninth Circuit in this case, the First Circuit has concluded that the absence of an explicit reference to attorney fees in the relevant provisions of CERCLA bars any recovery of attorney fees as part of the "necessary costs of response" under Section 107(a) of CERCLA.[6] On the other hand,

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[it] may deem necessary [and] * * * to recover the costs thereof").

[4] See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets omitted).

[5] If the Court grants review in this case and (contrary to our submission) reverses the decision of the court of appeals on the attorney fee issue presented by the petition, it should remand the *Key Tronic* case to the Ninth Circuit for further proceedings on the question whether Key Tronic nevertheless would be barred from recovery because of its contribution to the contamination of the site. Because the court of appeals ruled in the government's favor on the question presented in the petition, it had no occasion to consider that argument. Pet. App. A4.

[6] *Juniper Development Group* v. *Kahn* (*In re Hemingway Transport, Inc.*), 993 F.2d 915, 934-935 (1993) ("Congress did not consider, and [CERCLA] did not include, any attorney fee award

the Sixth and Eighth Circuits have reached a contrary conclusion, reasoning that the "necessary costs of response" include attorney fees.[7] The Tenth Circuit has adopted an intermediate position, under which attorney fees that are not incurred in pursuing litigation are recoverable, although attorney fees incurred in the Section 107 action itself are not recoverable. *FMC Corporation* v. *Aero Industries, Inc.*, 998 F.2d 842, 848 (1993); see also *United States* v. *Hardage*, 982 F.2d 1436, 1447-1448 (1992) (stating same rule in dictum). The *FMC* panel reasoned that attorney fees that are not incurred in pursuing litigation are not covered by the *Alyeska* rule, and then determined that such fees would be "necessary costs of response" if they were "necessary to the containment and cleanup of hazardous releases" at the site.[8] 998 F.2d at 848.[9]

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amendment applicable to the private cost recovery provision in [CERCLA Section 107(a)]. We therefore conclude that Congress has elected not to authorize attorney fee awards in these actions."), cert. denied, No. 93-187 (Oct. 12, 1993). The petition for a writ of certiorari in No. 93-187 did not raise the question presented in this case.

[7] *Donahey* v. *Bogle*, 987 F.2d 1250, 1256 (6th Cir. 1993) ("The court can conceive of no surer method to defeat [Congress's purpose that Section 107 provide an incentive for parties to remedy hazardous waste contamination] than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs."), petition for cert. pending, No. 93-428; *General Electric Company* v. *Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1421-1422 (8th Cir. 1990) ("Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the 'necessary costs' that [Section 107(a)] allows private parties to recover."), cert. denied, 499 U.S. 937 (1991).

[8] Petitioner Key Tronic argues (Pet. 12 n.14) that it would be entitled under the rule articulated by the Tenth Circuit to recover some of the attorney fees sought from the Air Force. In our view,

The practical consequences of the circuit conflict also counsel in favor of review by the Court at this time. The federal government and its various agencies often defend against suits, such as in the *Key Tronic* case at issue here, that seek to recover response costs based on the contributions of federal agencies to contamination at Superfund sites. The government is currently a defendant in 22 response cost actions pending in the Eighth Circuit and in 38 such cases in the Sixth Circuit. To the degree that plaintiffs have the opportunity to choose between forums, a continuing disparity in result between those courts and the First and Ninth Circuits could cause an increasing number of cases to be brought against the government in courts within those circuits.

any recovery of nonlitigation attorney fees permitted by Section 107 necessarily would be limited to fees "necessary to the containment and cleanup of hazardous releases," *FMC Corp.*, 998 F.2d at 848; we do not believe that any of the costs sought by petitioner Key Tronic fall within that category.

[9] The district courts in circuits that have not addressed the question at the appellate level also have reached conflicting results, with district courts disallowing fees in the Second and Third Circuits, see, *e.g.*, *Keystone Chemical Co.* v. *Mayer Pollock Steel Corporation*, No. Civ. A. 92-6000 (E.D. Pa. Apr. 7, 1993); *Alloy Briquetting Corporation* v. *Niagara Vest, Inc.*, 802 F. Supp. 943, 945-947 (W.D.N.Y. 1992); *Hatco Corporation* v. *W.R. Grace & Co.-Conn.*, 801 F. Supp. 1309, 1333 (D. N.J. 1992); *Leonard Partnership* v. *Town of Chenango*, 779 F. Supp. 223, 229-230 (N.D.N.Y. 1991); *New York* v. *SCA Services, Inc.*, 754 F. Supp. 995, 1000-1001 (S.D.N.Y. 1991); *T & E Industries, Inc.* v. *Safety Light Corp.*, 680 F. Supp. 696, 707-708 (D.N.J. 1988), and allowing fees in the Fourth and Seventh Circuits, see, *e.g.*, *HRW Systems, Inc.* v. *Washington Gas Light Company*, 823 F. Supp. 318, 345-346 (D. Md. 1993); *BTR Dunlop, Inc.* v. *Rockwell International Corporation*, No. 90 C 7414 (N.D. Ill. Feb. 16, 1993); *Chesapeake and Potomac Telephone Company* v. *Peck Iron & Metal Co.*, 814 F. Supp. 1281, 1282-1285 (E.D. Va. 1993), appeal pending, No. 93-1903 (4th Cir.).

Finally, we disagree with the argument of the private respondents (Br. in Opp. 4)[10] that the petition should be denied because CERCLA is currently before Congress for reconsideration and reauthorization. See CERCLA Section 111(p)(1), 42 U.S.C. 9611(p)(1) (Supp. III 1991) (funding for CERCLA authorized only through fiscal year 1994). As the Court explained in *Braxton* v. *United States*, 111 S. Ct. 1854 (1991), the possibility that Congress will resolve a conflict among the courts of appeals on a question of statutory interpretation is not generally a basis for this Court's refraining from considering the question. On the contrary, the Court explained there that it "[o]rdinarily * * * regard[s] the task as initially and primarily" the responsibility of the Court. *Id.* at 1857. Furthermore, respondents can only speculate that Congress's consideration of CERCLA will resolve the problem at hand. It is entirely possible that Congress will reauthorize CERCLA without any amendments whatsoever,[11] or with amendments that do not address the question presented by the petition.[12] Accordingly, we believe that it would be appropriate for the Court to consider the question at this time.

[10] "Br. in Opp." refers to the brief of the private respondents in opposition to the petition.

[11] That was the result the last time funding was extended. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6301, 104 Stat 1388-319.

[12] We are not aware of any bill pending before Congress at this time that would resolve the question presented by the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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